# Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-327

EDGAR I. SHOTT, JR.,

*Petitioner,*

vs.

THOMAS L. STARTZMAN,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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INDEX

TABLE OF AUTHORITIES







Constitutional and Rule Provisions

Secondary Authority



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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner Edgar I. Shott, Jr., respectfully prays that his petition for writ of certiorari be granted to review the judgment entry of the Supreme Court of Ohio entered in this case on June 3, 1977.

## OPINION BELOW

The judgment entry of the Supreme Court of Ohio in the original action in mandamus below has not yet been reported; however, it appears in Appendix A to this Petition.

## JURISDICTION

The judgment entry of the Supreme Court of Ohio was entered on June 3, 1977. This Petition has been filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

## QUESTION PRESENTED

Whether a rule precluding a disbarred attorney from "ever thereafter being readmitted to the practice of law" violates the Fourteenth Amendment to the United States Constitution by denying (1) procedural due process through creation of an irrebuttable presumption of perpetual unfitness and (2) denying equal protection of the laws and substantive due process through arbitrary selection of a small class of lawyers for imposition of a "professional death penalty," despite the fact that the loosely defined standards of bar discipline allow most errant lawyers to be reinstated upon proof of rehabilitation.

## CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

United States Constitution, Eighth Amendment:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Fourteenth Amendment:

Section 1 " *** [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."



Supreme Court of Ohio, Rules of Governance, Gov. R. V, §7:

"A person disbarred *** shall never thereafter be readmitted to the practice of law in this State."

## STATEMENT OF THE CASE

The rules governing the practice of law in the State of Ohio prohibit an attorney once "disbarred" from ever thereafter being readmitted to the bar. The Rule provides no criteria for determining who shall receive this "professional death penalty" as distinguished from lesser penalties including "indefinite suspension" (the next most serious penalty, which permits reinstatement after two years), Gov. R. V §7. Petitioner Edgar I. Shott, Jr., was permanently disbarred on April 19, 1967, Cincinnati Bar Ass'n v. Shott, 10 Ohio St. 2d 117, 226 N.E.2d 724 (1967). Disbarment was ordered upon a finding of conduct constituting moral turpitude. 10 Ohio St. 2d at 125-26, 226 N.E.2d at 730, 732. That conduct occurred over 17 years ago and resulted in a conviction in 1961 upon a trial where "The prosecuting attorney in his summation to the jury commented extensively upon" Mr. Shott's failure to testify on his own behalf. Tehan v. United States ex rel. Shott, 382 U.S. 406, 407 (1966). The offenses were rather technical ones; selling an unregistered security and selling a security without a license. "Moral turpitude" was inferred from extraneous circumstances not elements of the criminal offense. See 10 Ohio St. 2d at 125-136,

supra. Petitioner was never before nor has he since been convicted of or even charged with a crime (excepting minor traffic offenses).

After his disbarment, Mr. Shott served a one-year term of incarceration, was granted a final release and restoration by the Ohio Adult Parole Authority, and was licensed by the Ohio Insurance Department as a bail bondsman, his present occupation. The effect of Gov. R. V, §7 on Mr. Shott is to foreclose him from ever attempting to show that through the intervening seventeen years since the incident leading to his disbarment he has become rehabilitated and is presently fit to practice law.[1]

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[1]Shott has always maintained his innocence but more particularly he has steadfastly denied any moral turpitude, an element found only in the disbarment proceeding. In essence, Shott concedes that he issued a promissory note, found by the court that convicted him to be an unregistered "security." He also concedes that he invested the money obtained therefrom with one Stickler, who thereafter was proven to have been engaged in an unlawful "Ponzi" scheme. He has, however, maintained from the outset that he believed Stickler to be engaged in a lawful business and had no fraudulent knowledge or intent. No direct evidence was ever adduced against him on this contention. The Ohio Supreme Court apparently acted against him on the assumption that as a worldly-wise attorney, he should have known that Stickler's "investments" were too good to be true. The Ohio Rule prevents him from presenting new evidence on that issue.



In February, 1977, Mr. Shott brought an original action in mandamus in the Supreme Court of Ohio to compel the Clerk of that Court to accept his petition for reinstatement upon the ground, inter alia, that Gov. R. V, §7 is, both as written and applied, unconstitutional under both the Ohio and Federal Constitutions.[2] On June 3, 1977, the Ohio Supreme Court, after considering a brief on the merits from the Ohio Attorney General on behalf of the respondent Clerk, rendered a per curiam judgment (reproduced as Appendix A hereto) dismissing the action.

The effect of the Ohio Court Rule and its application in this case is to allow Ohio to indulge in an "irrebuttable presumption" that a former lawyer, once disbarred, is thereafter forever deemed unfit to practice the profession for which he was trained.

## REASONS FOR GRANTING THE WRIT

THE IRREBUTTABLE PRESUMPTION DOCTRINE DEVELOPED BY RECENT DECISIONS OF THIS COURT NEEDS FURTHER DEFINITION IN LIGHT OF CONFLICTING OPINIONS INVOLVING SUCH PRESUMPTIONS. THIS CASE IS A PROPER VEHICLE FOR EXPLAINING THOSE DECISIONS.

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[2]Under Ohio law, the Ohio Supreme Court has exclusive jurisdiction in bar disciplinary matters. Hence, the petitioner had no choice but to begin his action in that Court.

In the past few years, this Court has had a number of opportunities to consider state action that created conclusive presumptions. See, e.g. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). Irrebuttable presumptions have been struck down in some instances, Turner v. Dep't of Employment Security of Utah, 423 U.S. 44, 46 (1975); LaFleur, supra; Vlandis v. Kline, 412 U.S. 441 (1973); upheld in some, Weinberger v. Salfi, 422 U.S. 749, 772 (1975); and more or less ignored in others, Massachusetts Board of Retirement v. Murgia, 472 U.S. 307 (1976). It is respectfully submitted that no internally consistent legal theory has emerged to reconcile these decisions. See, Ackerman, "The Conclusive Presumption Shuffle," 125 U. Pa. L. Rev. 761, 762 (1977); Gordon and Tenebaum, "Conclusive Presumption Analysis: The Principle of Individual Opportunity," 71 N.W.L. Rev. 579, 582 (1976).

The rule challenged at bar seems to present a classic case of an unconstitutional irrebuttable presumption. The "presumption . . . [is] not necessarily or universally true in fact." Vlandis v. Kline, 412 U.S. 441, 452 (1973). The fact of perpetual unfitness is irrebuttably drawn from the fact of disbarment; an individualized determination of whether the circumstances of the disbarment and the rehabilitative progress since the disbarment warrant a fact finding of fitness is foreclosed by the rule. Cf. Cleveland Board of Education v. LaFleur, supra, 414 U.S. at 648-49. Ohio already has a "reasonable alternative means of making the crucial determination" (Vlandis v. Kline, supra, 412 U.S. at 452) of fitness through the same process used for indefinitely suspended attorneys who, under the Ohio rules, may be reinstated. See also, United States Dep't of Agriculture v. Murry, 413 U.S. 508, 514 (1973). This procedure is used in many more cases than is the irrebutable presumption used in permanent disbarment cases, since many more attorneys are suspended than disbarred. Hence, the argument of administrative convenience cannot be used by Ohio in this case. (Cf. Weinberger v. Salfi, supra.)



Under Ohio law, disciplinary procedure is not considered punishment but is rather concerned with protection of the public interest. In re Thatcher, 83 Ohio St. 246, 249, 93 N.E. 895,, 896 (1910). Ohio disciplinary procedures thus do not purport to meet standards of procedural due process required in punitive proceedings. See Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). Hence, the only issue involved in Ohio disbarment is the public interest in precluding the attorney from future law practice. Yet, at the same time Ohio denies to one disbarred the crucial opportunity to prove that the public interest would be served by restoring him to the useful practice of his chosen and trained-for profession. "Purely economic matters" are not at issue here (cf. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 23-24 (1976)); instead, the liberty and property interests of a person trained and experienced in a learned and constitutionally recognized profession, NAACP v. Button, 371 U.S. 415 (1963), are at stake. Cf. Allgeyer v. Louisiana, 165 U.S. 578 (1897).

The application of the irrebuttable presumption doctrine to this case is, however, not made easy by decisions of this Court. For example, how important must the affected interest be to partake of the doctrinal protection? Must it be one of the "basic human liberties," Turner v. Dep't of Employment Security of Utah, supra, 423 U.S. at 46?; an incremental sum of money, Vlandis v. Kline, supra?; or merely something other than a social welfare benefit, Weinberger v. Salfi, supra? How generally valid need the presumption be to justify generalized determinations? Must it be substantially accurate, Mourning v. Family Publications Service, Inc., 411 U.S. 356, 377 (1973); believed accurate by concensus, Cleveland Board of Education v. LaFleur, supra, 414 U.S. at 799-800, n. 13; or merely the shortest route to a presumed fact, Vlandis v. Kline, supra, 412 U.S. at 452-53, n. 9?

What type of state interest will overwhelm the individual's right to an individualized determination? Can it be the interest in domestic relations, Sosna v. Iowa, 419 U.S. 393 (1975); child custody, Stanley v. Illinois, 405 U.S. 645 (1972); consumer's rights, Mourning v. Family Publications Service, Inc., supra; or working conditions, Usery v. Turner Elkhorn Mining Co., supra? How complex may the fact finding on the individual's rebuttal be before the presumption is allowed? Need it be quite involved, Stanley v. Illinois, supra, 405 U.S. at 657-58; conditioned on other facts, Bell v. Burson, 402 U.S. 535, 541-43 (1971); or fairly easy, United States Dep't of Agriculture v. Murry, supra?



The cases at present do not support a single cohesive theory on irrebuttable presumption because on each element there are seemingly inexplicable divergences from one decision to another. Further, the precedent is even unclear on when the irrebuttable presumption analysis applies. In Weinberger v. Salfi, supra, this Court seemingly discounted due process analysis and measured the statute only on equal protection standards.

Petitioner submits that even using the Salfi analysis, Gov. R. V, §7 is unconstitutional. First, no governmental interest is served if a disbarred attorney is rehabilitated yet still denied reinstatement. Secondly, insofar as a lawyer can use his skills to his and his family's maintenance and in the service of society, relegating rehabilitated attorneys to membership in the class of the permanently disbarred renders that class overinclusive. Jimenez v. Weinberger, 417 U.S. 628, 637-38 (1974). Third, imposition of the penalty of permanent disbarment is done without written, controlling standards resulting in a "crazy-quilt" pattern of discipline. Cf. Baker v. Carr, 369 U.S. 186, 222 (1962). Finally, because Ohio's "professional death penalty" operates in so irrational and haphazard a manner, it not only violates the Fourteenth Amendment due to its arbitrariness, Cohen v. Hurley, 366 U.S. 117, 122 (1961), but it also violates the incorporated Eighth Amendment prohibition against cruel and unusual punishment. Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

In petitioner's view, under either the irrebuttable presumption doctrine or an equal protection or substantive due process analysis, Ohio Supreme Court Gov. R. V, §7 is unconstitutional. The absence of a cohesive legal theory and the presence of unreconciled opinions in this area suggest a broad general interest in clarification by this Court both for the guidance of courts below and for the protection of citizens in similar circumstances.[3]

## CONCLUSION

Unless the irrebuttable presumption of unfitness created by Ohio Governance Rule V, §7 is declared unconstitutional, petitioner Shott, without a hearing, will forever remain deprived of an important property interest and a vital personal

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[3]The need for explication of clear constitutional standards is particularly compelling due to the broad utilization by professional licensing bodies of prior criminal conduct, characterized as "moral turpitude," to irrebuttably presume unfitness on the part of those very persons whom society is trying to restore to useful lives. See, e.g., National Clearinghouse on Offender Employment Restrictions, Laws, Licenses, and the Offender's Right to Work 3 (1973); "Fair and Certain Punishment," Report of the Twentieth Century Task Force on Criminal Sentencing 29 (1976).



liberty interest, despite the fact that seventeen years of productive and exemplary life since his solitary transgression strongly suggest that he may now, in fact, be fit to return to the practice of law.

Furthermore, the law of irrebuttable presumption calls out for clarification since judges, writers, lawyers, and citizens are currently unable to reconcile the precedents in this area.

For these and the foregoing reasons, it is respectfully requested that a writ of certiorari be issued to review the judgment of the Supreme Court of Ohio in this case.

Respectfully submitted,

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## APPENDIX

## APPENDIX A

Judgment Entry of Supreme Court of Ohio
(June 3, 1977)

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No. 77-229
SUPREME COURT OF OHIO
State of Ohio, City of Columbus

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The State of Ohio, ex rel. Edgar I. Shott, Jr.,

Relator,

vs.

Thomas L. Startzman, Clerk, Supreme Court of Ohio,

Respondent.

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IN MANDAMUS ON MOTION TO DISMISS

This cause originated in this court on the filing of a complaint for a writ of mandamus and was considered in the manner prescribed by law. On consideration of the motion to dismiss, it is ordered by the court that this motion be, and the same hereby is, sustained, and cause dismissed.